

In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claim-
ant of the Motor Tanker "URANIA," Her Engines,
Tackle, Apparel, Furniture and Equipment,
Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners
doing business under the name and style of Com-
mercial Ship Repair,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

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TODD, HOKANSON & WHITE,
RUSSELL V. HOKANSON,
RICHARD S. WHITE,
Proctors for Appellees.

682 Dexter Horton Building,
Seattle 4, Washington.

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TABLE OF CONTENTS

	<i>Page</i>
Argument	1
1. Since appellees' contractual undertaking respecting the main engine was limited to lending personnel to work under appellant's supervision and control, responsibility for the acts of appellees' employees pursuant to such undertaking was solely that of appellant.....	2
2. Assuming <i>arguendo</i> appellees had a contractual duty and responsibility for the acts of its employees in performing work on the main engine, no breach of duty, either contractual or tortious, was established	9
3. Assuming <i>arguendo</i> (a) that appellees had a contractual duty or obligation, and (b) that such duty was breached, appellant wholly failed to establish or sustain proof that its damages were proximately caused by such breach.....	18
Other probable causes.....	25
Clayton Heating Boiler	34
Telemotor	38
Burden of Proof	40
Damages	43
Conclusion	44

TABLE OF CASES

<i>America-B. F. Jones</i> (C.C.A. 6) 1945 A.M.C. 987	43
<i>Atlantic Transport Co. v. Coveys</i> , 82 Fed. 177, 28 C.C.A. 388 (C.C.A.2, 1897).....	8
<i>Commandant, The</i> , 23 F.(2d) 100 (D.C.Md. 1928)	8
<i>DuPont, The</i> , 14 F. Supp. 193 (D.C. Md. 1936)....	42
<i>Moe v. American Ice & Cold Storage Co.</i> , 30 Wn. (2d) 51, 190 P.(2d) 755 (1948).....	42
<i>Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.</i> , 281 Fed. 97 (C.C.A. 2, 1922).....	40, 41, 42
<i>Penelopi, The</i> , 148 F.(2d) 884 (C.C.A.2, 1945).....	44

TEXTBOOKS

	<i>Page</i>
6 Am. Jur. 461, §381.....	42
35 Am. Jur. 455-6, §18.....	8
9 C.J. 754, §88.....	8
39 C.J. 1277, §1462.....	8
8 C.J.S. 347, §50.....	41
O'Brien, Manual of Federal Appellate Procedure (3rd ed. 1941) 112-13, and cases cited therein.....	6
Restatement of Agency, §227.....	8

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Appellee.

No. 12322

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NORTHERN DIVISION

BRIEF OF APPELLEES

ARGUMENT

In our argument we shall first discuss the main engine breakdowns and then consider separately the issues raised by appellant's claims relating to the Clayton boiler and the telemotor system.

Appellees' position on the main engine breakdowns may be summarized in the following three propositions, which will be considered in order:

1. Since appellees' contractual undertaking respecting the main engine was limited to lending personnel to work under appellant's supervision and control, responsibility for the acts of appellees' employees

pursuant to such undertaking was solely that of appellant.

2. Assuming *arguendo* appellees had a contractual duty and responsibility for the acts of their employees in performing work on the main engine, no breach of duty, either contractual or tortious, was established.
3. Assuming *arguendo* (a) that appellees had a contractual duty or obligation, and (b) that such duty was breached, appellant wholly failed to establish or sustain proof that its damages were proximately caused by such breach.

Thus, in order to prevail on this appeal, appellant must prove (1) a duty, (2) a violation thereof, and (3) damages directly and proximately resulting from such violation of duty. Appellant's brief addresses itself exclusively to propositions two and three. From appellant's viewpoint this avoidance of proposition one is understandable, since its case cannot survive a discussion thereof.

1. Since appellees' contractual undertaking respecting the main engine was limited to lending personnel to work under appellant's supervision and control, responsibility for the acts of appellees' employees pursuant to such undertaking was solely that of appellant.

As appellant observed on page 11 of its brief, this appeal involves primarily questions of fact. Appellant's "Statement of Case" entirely overlooks one essential fact, a fact so crucial that the trial judge held it in itself to be decisive of the liability for the main engine breakdowns.

That fact is that the work of cleaning and testing the lubricating oil cooler on the main engine (Appellant's Br. 4) was contracted to be performed (Aps. 326-7) and was actually performed (Aps. 1437, 1439, 1447) in all respects subject to and under the supervision and in accordance with the directions of the vessel's chief engineer. The trial court's decision on this matter as expressed in its opinion delivered at the close of the case is as follows:

"* * * libelants (appellees) as repairmen undertook on their own responsibility no duty to determine the extent of repairs or servicing or testing which was to be done, but did only what the chief engineer specifically directed in pursuance of the contract stipulation in that connection." (Aps. 1724)

Appellant in its "Statement of Case" (Appellant's Br. 5) glosses over this crucial phase of the case as follows, "All of the work on the lubricating oil cooler was done by appellees' workmen without participation by members of the crew (Aps. 716, 738-9)." Careful reading of the references cited to the record reveals that they contain merely the bare assertion by appellant's chief engineer that the "work" on the cooler was done by appellees' workmen. However, there is nowhere in the record a denial by any witness of the fact that all "work" was requested, specifically prescribed, supervised and approved by appellant's authorized agents.

Consideration of the voluminous testimony relating to possible causes of the "Urania's" main engine breakdowns is unnecessary unless the following finding of the District Court is overturned:

“That with respect to work on main engine of said vessel libelants (appellees) undertook on their own responsibility no duty to determine the extent of repairs, servicing, or testing necessary, but did only what the chief engineer of said vessel directed in pursuance of contract stipulation in that connection.” (Aps. 87-88)

The original contract between appellant and appellees referred to on page 3 of appellant's brief made no provision whatsoever for work on the main engine of the “Urania” (Aps. 178-195). All labor and material to be furnished by appellees for the main engine was ordered by appellant's representative, Harry F. Williams, subsequent to the execution of the original contract. This additional work ordered by Mr. Williams for the main engine was, pursuant to contractual engagement, all to be done subject to the direction and supervision of the vessel's chief engineer, appellees to furnish only such assistance as appellant requested through its authorized agents (Aps. 326, 327, 349, 597, 598). The ship's crew was to effect the repairs to the main engine, and to rely on yard personnel only to perform such tasks as Mr. Williams and the chief engineer of the vessel might direct and supervise (Aps. 349, 1462). One of the most keenly contested issues in the trial of the case was the extent of the authority of Mr. Williams to bind appellant. The trial court found that Mr. Williams had full and complete authority as speaking agent to represent appellant for all purposes in connection with the repair, alteration and renewal of the “Urania” (Aps. 83). On this appeal, appellant has

abandoned its contention that the authority of Mr. Williams was limited in any way, and the trial court's finding concerning the extent of Mr. Williams' authority is the law of the case.

Mr. Williams' testimony before the District Court fully established that all work done in connection with the main engine was to be done and was in fact done under the supervision of the vessel's chief engineer (Aps. 326-7). This work, of course, included the cleaning and testing of the oil cooler. Mr. Williams' testimony was fully corroborated by other witnesses, namely, Mr. Lindgren (Aps. 293), Mr. Woodman (Aps. 1462), and Mr. Oakland (Aps. 1437, 1441), and by the written survey report of Mr. Williams to appellant (Aps. 349). The fact of the cleaning and testing is also recorded in the vessel's engine log, the entries of which were made in the Greek language by the chief engineer, under whose supervision this work was done. This log entry, dated September 4, 1948, was translated by appellant's director, Demetri Antippas, as follows: "Cleaning and testing by hydraulic pressure of the oil and water cooling radiator of main engine" (Aps. 1426). There is no testimony in the record to the contrary, by deposition or otherwise. Surely the bare assertion of the chief engineer that the "work" was done by appellees' employees is insufficient to raise a contrary inference. Indeed, this testimony is entirely consistent with the Court's finding. The well settled rule of this Court that a district court's finding, based solely on live testimony, cannot be upset unless clearly erroneous, applies to this finding. Based as it is on uncontro-

verted testimony, it can hardly be argued that the finding is "clearly erroneous." See O'Brien, Manual of Federal Appellate Procedure (3rd ed. 1941) 112-13, and cases cited therein.

Appellees' pipe shop foreman, Walter Oakland, testified that the work accomplished by him in the cleaning and testing of the cooler was done at the request of and pursuant to the directions of the chief engineer in strict accordance with contract stipulation. His testimony, which is nowhere disputed, shows that the chief engineer stopped him one day aboard the vessel and requested him to clean and test the heat exchangers and lubricating oil cooler (Aps. 1437). Furthermore, the chief engineer prescribed specifically the amount of pressure to be used in testing the same (Aps. 1437). These instructions were carried out, the cleaning accomplished and the test applied as prescribed (Aps. 1438-39). Mr. Oakland then reported to the chief engineer, requesting that he inspect the heat exchangers and oil cooler while under hydrostatic test, and the chief engineer thereupon sent his assistant engineer to examine them. The examination was made by the assistant engineer and by Mr. Frank Gallagher, the American Bureau of Shipping surveyor (Aps. 1439) in Mr. Oakland's presence and no leaks were found (Aps. 1440). Mr. Gallagher, who attended the vessel for classification purposes while the same was at appellees' yard, corroborated Mr. Oakland by deposition testimony to the effect that he remembered witnessing the test described (Aps. 1693). Mr. Gallagher's report of survey (Libelants' Exhibit No. 17) confirms his testimony, disclosing

that the oil cooler and heat exchangers were examined by him and found in good condition (Aps. 1658-59). Mr. Williams, who supervised the entire job for appellant stated also that the cooler was cleaned and tested (Aps. 362).

Since appellant's claim for damages resulting from main engine breakdowns is based solely upon alleged negligence in the cleaning and testing of the lubricating oil cooler, and since all work performed by appellees' employees was as borrowed servants, their acts as such were the acts of appellant. The rule of law applicable to the instant situation is set out in American Jurisprudence as follows:

"One who has the status of general servant or employee may be lent or hired by his master to another for some special service so as to become, as to that service, the servant of such third person, the test being whether, in the particular service which he is engaged to perform, he continues to be under the direction and control of his master or becomes subject to that of the person to whom he has been lent or hired. Where an employee, with his consent, has thus been lent by his general employer to another person, he is deemed to have become, for all purposes of the relationship of master and servant, the employee of the borrower. For the time being, he is subject to the borrower's control and direction. However, the conclusion as to his status is the same regardless of the showing as to whether the person to whom he has been lent actually exercises his right of control or direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill

for the result." 35 Am. Jur. 455-56, Master & Servant, Sec. 18.

The same principle is enunciated in the Restatement of Agency, Sec. 227, Servant Lent to Another Master, as follows:

"A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others."

Illustration 3 (page 503) under the section quoted above is as follows:

"P, a master carpenter, by agreement with B, sends A, a skilled cabinetmaker, to work with B's servants for a week, under the direction of B's foreman, in the reconstruction of a stairway. For this B is to pay P an agreed amount. A acts as the servant of B in building the stairway."

Two illustrative cases applying this principle to work aboard ships are *The Commandant*, 23 F.(2d) 100 (D.C.Md. 1928) and *Atlantic Transport Co. v. Coveys*, 82 Fed. 177, 28 C.C.A. 388 (C.C.A.2nd 1897).

The only negligence for which a lending master can be held is for "knowingly furnishing an incompetent servant." 39 C.J. 1277, Master and Servant, Sec. 1462. But appellant has never charged appellees with this type of negligence, nor would the proof support it if such a charge had been made.

Furthermore, since appellant's chief engineer specifically prescribed the test to be applied, appellant is in no position to challenge the sufficiency thereof. Thus, in 9 C.J. 754, Building and Construction Contracts, Sec. 88, it is written:

“The builder is not responsible for defects arising from doing the work in the manner directed by the owner or his authorized representative, or which are caused by acts of the owner during the progress of the work.”

The District Court's finding of fact concerning the extent of the contractual duty assumed by appellees, together with its companion finding that the work was actually done in strict accordance with contract stipulation is based on live undisputed testimony. No question of credibility of witnesses is involved. From these findings it follows as a matter of law, applying the well settled principles above set forth, that the acts of appellees' employees, while engaged in work on the lubricating oil cooler, were the acts of appellant. This being so, appellant's case fails at the very outset.

2. Assuming *arguendo* appellees had a contractual duty and responsibility for the acts of its employees in performing work on the main engine, no breach of duty, either contractual or tortious, was established.

We believe that this Court will find it unnecessary to consider this proposition, since the issue of appellees' duty, if decided in appellees' favor, will be decisive of this appeal. However, appellant has attacked the District Court's finding that the services of appellees' employees furnished to assist the vessel's chief engineer were competent and done in a workmanlike manner. We shall proceed, therefore, to discuss the evidence relating to this alleged negligence and incompetence.

Appellant's own representative, Harry F. Williams, who supervised the entire job, including the main contract and all additional work, testified that the work of appellees was done in a competent and workman-like manner. Moreover, all work was approved upon completion not only by Mr. Williams, but by Mr. Gallagher, the surveyor for the American Bureau of Shipping (Aps. 595-6), who was requested by appellant to survey the vessel (Aps. 1630-31).

We are here concerned specifically with the finding of the Court as it relates to the competence of Walter Oakland, appellees' pipe shop foreman, and whether the work accomplished on the lube oil cooler was properly performed. As to his competency to do this work, there can be little question, as he had held this position for thirty years in the same repair yard (Aps. 1434) during which time he had cleaned and tested hundreds of coolers of various types (Aps. 1435). J. D. Gilmour (incorrectly spelled "Gilmore" in the apostles), a marine surveyor whose qualifications were quickly conceded by appellant (Aps. 1481), testified that he had known Mr. Oakland since 1923 or 1924 and had always found his work most satisfactory (Aps. 1483). The circumstances under which Mr. Oakland undertook the cleaning and testing of the lube oil cooler have already been related. The cleaning and testing method used was described by him in detail (Aps. 1438-41). Mr. Gilmour testified (1) that the solution used by Mr. Oakland in the cleaning process had an excellent reputation for effectiveness in cleaning pressure vessels (Aps. 1485), (2) the method used in testing the cooler in question,

“was a good, fair pressure test,” conforming to good marine practice (Aps. 1487), and (3) the methods followed were standard practice in cleaning any heat exchanger, lubricating oil cooler or fuel oil heater (Aps. 1488). Frank E. Blumberg, a licensed professional engineer in mechanical and marine engineering and naval architecture, whose qualifications included nearly seven years as assistant engineer at Todd Pacific Shipyards, Seattle Division, in charge of its engineering department, testified to the same effect (Aps. 1560).

In the face of direct proof establishing that no leaks existed in the cooler when tested by Mr. Oakland in the presence of the vessel's engineer and Mr. Gallagher, appellant asks this Court to indulge in the highly speculative inference that because leaks were found more than two months after the cleaning and testing had been completed, they must have existed when Mr. Oakland's test was applied. This speculation, moreover, would require this Court to ignore the evidence of intervening acts and events which could have caused the leaks which were later discovered, and as a legal proposition to hold appellees were insurers against the contingency of such supervening causes. To overcome the weight of the District Court's finding, appellant urges that it is lessened because some of the testimony covering this matter was given by deposition. But the deposition testimony involved does not compete with the testimony heard by the District Court. Mr. Oakland was the only witness heard by the District Court on the question of the actual cleaning and testing. There is no deposition

testimony disputing that his work was accomplished in the manner described by him, and indeed, his testimony is corroborated by the deposition of Mr. Gallagher (Aps. 1672, 1693) and inferentially by the vessel's engine room log entry of September 4, 1948 (Aps. 1426).

Appellant emphasizes that the oil cooler contained a stamp on the exterior describing a 300-pound pressure test on the salt water side (Appellant's Br. 22). This is based on the testimony of Mr. Antippas that he saw the stamp the day before his testimony. To begin with, it should be noted that Mr. Antippas' only information as to the stamp was from looking at an exhibit which was rejected by the trial court for want of proper identification. If the exhibit itself was inadmissible as insufficiently identified, the testimony of Mr. Antippas as to a stamp on the exhibit would appear to be doubly incompetent, as hearsay evidence based on information gathered from an improper source.

The appellant quotes from the operating manual for the main engine (Appellant's Br. 23), wherein information relative to the lube oil cooler is set out. This information, described as performance data, shows test pressure (with water) 200 p.s.i. It is not clear which of the two tests appellant thinks is correct, 300 p.s.i. or 200 p.s.i., but it is abundantly clear from the testimony that none of this data is applicable in determining whether a proper test was used by Mr. Oakland. The evidence shows that the lube oil cooler was operated by pumps delivering an operating

pressure of approximately 20 pounds per square inch on the oil side (Aps. 878) and 7 pounds per square inch on the salt water side (Aps. 880). The engine room log (Respondent's Exhibit A-12) discloses that during the "Urania's" voyage, a pressure of 18 p.s.i. on the oil side and 7 p.s.i. on the salt water side was maintained uniformly between October 16 and October 26, 1948 (Also see Aps. 1376). Mr. Blumberg, former Assistant Chief Engineer of Todd Pacific Shipyards, testified that (a) considering operating pressures of the lube oil cooler, the tests used by Mr. Oakland were satisfactory and conformed to general shipyard practice in the Northwest (Aps. 1560); (b) the test was proper even assuming a nameplate prescribed a 300 pound pressure because such plates indicate the factory test and are used to prove the factory's own design and workmanship (Aps. 1560-61); and (c) it is not the practice in shipyards to test at the pressures prescribed by the factory, but to test according to the use which the apparatus is to be put (Aps. 1561). Mr. Gilmour testified that the pressure test of the cooler in question would be adequate if one and a half times greater than the maximum operating pressure to which the cooler was subject (Aps. 1488). Mr. Gilmour also pointed out that this type cooler can be used for many purposes and that the pressure noted on the name plate would be the maximum pressure to which the apparatus could be safely subjected (Aps. 1488). Mr. Herman Sanwick, formerly chief engineer of Rear Admiral Richard E. Byrd's flagship on the United States Antarctic Expedition, and during the war, chief testing engineer for the Wins-

low Marine Railway and Shipbuilding Co. where he had charge of the testing of seventeen diesel-powered vessels built for the United States Navy, testified that the practice in pressure testing heat exchangers or coolers is to apply twice the working pressure on a new installation, and that on a used installation, Coast Guard inspection requirements are one and a half times the working pressure (Aps. 1610). Mr. Oakland, who had 30 years experience in cleaning and testing this kind of equipment, stated that the pressure test would depend on the amount of working pressure and that the American Bureau of Shipping rules prescribe a test of twice the operating pressure of the particular unit, but not less than 15 pounds (Aps. 1441-42). Perhaps nothing illustrates the absurdity of appellant's claim that the test was improper more clearly than the testimony of appellant's general agent and representative, Mr. Williams, a man of 40 years experience in the marine business, who testified that a hydrostatic test equal to the working pressure of the cooler would be suitable (Aps. 362).

Not only was Mr. Oakland's work accomplished in a workmanlike manner but the method used was directed by appellant through its agent, the chief engineer. It is scarcely conceivable that the American Bureau of Shipping surveyor, Mr. Gallagher, would have approved the test and reported the cooler in good condition (Aps. 1658-9) had the test been improper. The performance of the lubricating oil cooler, subsequent to its installation after cleaning and testing at appellees' yard, gives further support to the District Court's findings. Mr. Gallagher testified that temper-

ature results obtained by use of the cooler during the sea trial were satisfactory (Aps. 1672). Mr. Antippas, director of appellant corporation, reviewing the engine room log for the period between the vessel's sailing date, October 15, and October 26, the date of the first breakdown, said that temperatures and pressures were within normal operating range prescribed for the main engine (Aps. 1376). Even the witness Cross, of the Union Diesel Engine Company, who went aboard the vessel at Manzanillo to effect repairs and who remained aboard until the vessel returned to Los Angeles, testified that the lube oil cooler functioned properly during that trip, a period during which appellant contends leaks were causing contamination to the oil cooler (Aps. 1060).

Appellant's own expert, Mr. Dupuy, who surveyed the vessel for Lloyds' agents when it arrived at Los Angeles from Manzanillo under tow, testified it was customary to test the top by the working pressure of the particular unit (Aps. 1216). Of even greater significance is the fact that after he had learned of the leaks in the cooler, he recommended that it be soldered where leaking and proven tight upon completion of its repairs with a hydrostatic test of only 100 pounds (Aps. 1216, 1327), in spite of appellant's claim that any test short of that prescribed in the operating manual or on the name plate would be negligent.

With respect to appellant's contention that this cooler was excessively dirty when opened up at Los Angeles, it is simply without substance, as Mr.

Pike, one of appellant's expert witnesses, examined it and stated unequivocally that it was only normally dirty to the extent that would be expected after a 2400 mile voyage (Aps. 1187-88).

There is a complete absence of any credible evidence that Mr. Oakland's test was improper in any way or that leaks were present when he cleaned and tested the cooler. But there is considerable evidence that the leaks were caused at a later date. Appellant's expert, Mr. Pike, who surveyed the vessel at Los Angeles, testified there were lots of possible causes for leaks developing in the seams of the cooler, including excessive vibration of the engine (Aps. 1191). Mr. Sanwick stated that a defect in the solder could cause it to break loose and develop leaks around the seams and that vibration of the engine could effect such leaks (Aps. 1611). Mr. Blumberg stated that engine vibration or improper installation of the cooler or action of salt water could create such leaks (Aps. 1566).

There is persuasive evidence that the leaks may have been developed in the process of cleaning and testing the cooler at Los Angeles. The leaks discovered there in the testing process were of such minute size as not to be visible with the naked eye, this having been established by appellant's own witnesses, M. F. Newell (Aps. 1109), who observed part of the test, William H. Weiler, who did the cleaning and testing (Aps. 1125), and Mr. Pike, who looked at the cooler before its removal from the vessel (Aps. 1187). The cooler consists of a core made probably of cupro-

nickel (Aps. 1520), which is contained within the housing or casing made of bronze (Aps. 1099), the core being soldered to a plate, which in turn is soldered to the housing (Aps. 1133). It was in these soldered seams that the leaks occurred (Aps. 1136-37). Before the testing was conducted, the cooler was immersed in a solution and boiled for three or four hours at 212 degrees Fahrenheit (Aps. 1127-28, 1138). Upon completion of the boiling the cooler was submerged in water, and air pressure ranging from 160 to 200 lbs. per square inch was applied to the inside of the cooler on the water side (Aps. 1122-23). This test disclosed leaks in the soldered seams evidenced by air bubbles no larger than the thickness of the lead in a pencil (Aps. 1141). The witness Weiler, who conducted the test, frankly observed, "They were such high pressure that it wouldn't take much of a seam to—that is, much of an opening for them to leak" (Aps. 1125). With respect to this whole procedure, Mr. Blumberg testified that (a) because of the unequal co-efficient of expansion in the different metals, such boiling procedure could produce the leaks discovered upon testing (Aps. 1566), (b) an air pressure test under water is used to show porosity only, and that a hydrostatic test of one and a half to two times usual working pressure is used to show both leaks and strength (Aps. 1567), and (c) the test described was an extremely severe one (Aps. 1567) and should be applied to a pressure vessel that would have had a previous hydrostatic test of 800 to 1000 pounds (Aps. 1568).

In summary, we submit (1) that Mr. Oakland's

work was competently performed in accordance with accepted practice, (2) the record is devoid of evidence that leaks existed at the time of cleaning and testing by Mr. Oakland, (3) whatever the merit of the test applied by Mr. Oakland, it was the test selected and directed by appellant.

3. Assuming *arguendo* (a) that appellees had a contractual duty or obligation, and (b) that such duty was breached, appellant wholly failed to establish or sustain proof that its damages were proximately caused by such breach.

The best analysis of this phase of the case is contained in the District Judge's opinion at the close of the trial (see Aps. 1722-1725), which analysis may be epitomized in the following observation of the Court:

"The Court is not entirely convinced by the evidence as to just exactly what was the cause of that engine trouble or of the galling of those gears, but I am convinced of one thing, and that is, of the failure of the cross libelant to sustain the burden of showing, by a preponderance of the evidence, just what the cause was." (Aps. 1723)

Appellant produced four expert witnesses on whose opinion as to cause of the main engine breakdowns it rests the causation phase of its case. It is true that these witnesses saw the vessel upon its return to Los Angeles, an opportunity which appellees did not have because of appellant's unexplained (Aps. 1416) neglect to advise appellees that breakdowns had occurred and that attempt would be made to fasten liability

therefor on appellees. This neglect is even harder to understand in view of the fact that a libel action by appellees against the vessel to recover their repair bill had been pending for almost one month (Aps. 4). Nevertheless an analysis of the testimony of these witnesses will disclose that to the extent that they held opinion as to cause, such opinion was speculative only. Furthermore, they admitted that other causes had not been fully or properly explored.

The "Urania" was powered by a Union Diesel engine. The vice-president of the engine company, S. W. Newell, whose interest in protecting the reputation of the engine is apparent from his testimony, although called by appellant, stated flatly that the cause of the breakdown could not, under ordinary operating conditions, have resulted from leaks in the oil cooler (Aps. 937). His reason for this opinion was that even if there were leaks in the cooler, salt water could not enter the oil because of the higher operating pressure of the oil (18 p.s.i.) as opposed to the sea water coolant (7 p.s.i.) (Aps. 937).

Mr. Summers, a marine surveyor called by appellant, although expressing opinion that oil contamination because of leaks in the cooler was the cause of gear failure, nevertheless testified that (a) he didn't go into any real analysis of ultimate cause after finding what he thought was the "meat" of the trouble (Aps. 1257), (b) in giving his opinion which, he emphasized, was merely an opinion, he had to theorize, "because there are so many sides to it and we may or may not be correct in the opinion" (Aps.

1267-68), (c) he could have made a much more thorough analysis of the ultimate cause had he known the matter was to be litigated (Aps. 1279-80), (d) an overload of the timing gears could cause shaft deflection and galling of such gears (Aps. 1275).

The third expert called by appellant, Mr. Pike, the American Bureau surveyor, refused to give an opinion as to the cause stating that while poor lubrication could be a cause along with foreign matter or overheating, "I mean there was no one opinion I could give. I would not state my opinion of the thing, because that would not be fair" (Aps. 1181).

The opinion of appellant's fourth expert, Mr. Dupuy, was expressed in his report (Respondent's Exhibit A-22) "Because of the leaking lube oil cooler and the salt water found in the lube oil system it appears that the failure of the timing gears was caused by this condition" (Aps. 1329). However, he admitted that (a) he never sampled the oil remaining in the pockets of the engine bed himself to determine its condition (Aps. 1210), nor did he observe the leaks, this fact having been reported to him by others (Aps. 1218); (b) there could have been very many other causes for the gear failure (Aps. 1219); (c) salt water couldn't get into the oil through leaks in the cooler while operating if the oil pressure was higher than the water pressure, and he did not even know what the pressures were in this cooler (Aps. 1234); and (d) he would have recommended placing spare timing gears aboard after the repairs were made because of the trouble that had been experienced (Aps. 1224).

A summation of this testimony is that appellant's witnesses, Mr. S. W. Newell and Mr. Dupuy, have repudiated appellant's theory that the oil became contaminated through leaks in the cooler, because the salt water under a low pressure could not enter the higher pressure lubrication oil zone through minuscule leaks in the cooler. Mr. Pike refused to give an opinion, reflecting a view that the real cause could not be established. This leaves appellant clinging to the testimony of Mr. Summers, who characterized his own opinion as a mere theory, there being so many sides to the possible causation.

Arrayed against the vestige remaining of appellant's theory is the expert testimony of J. D. Gilmour, a professional engineer and marine surveyor of over thirty years experience who testified that (a) if the cooler had leaked under the operating pressures of 18 pounds on the oil side and 7 pounds on the salt water side, the oil would have flowed into the salt water coolant and overboard, and the salt water couldn't have entered the oil (Aps. 1496); (b) the construction of the cooler aboard the "Urania" is such that the seams where the leaks were discovered are covered by a gasket which would have prevented any leakage at all (Aps. 1496); and (c) if the lubricating oil had been contaminated, the first parts of the engine to be affected would have been the main, crankshaft and cross-head bearings, because of the babbit metal contained in those parts, and the greater burden borne by them (Aps. 1496, 1503).

Mr. Frank E. Blumberg, an expert witness called

by appellees, not only fully corroborated the testimony of Mr. Gilmour, but stated that it would not be possible for salt water at 7 p.s.i. to penetrate leaks of the size alleged to have been found at Los Angeles, and that he had serious doubts whether water would get through such leaks even if a pump capable of delivering one hundred pounds pressure were applied to the salt water side of the cooler (Aps. 1568-69).

Mr. Herman Sanwick, outstanding Diesel engine expert, stated that salt water could not infiltrate through leaks in the cooler where the pressure of the oil was higher than the pressure of the water (Aps. 1620).

How can it possibly be said on this state of the record that appellant has sustained proof as to its theory of causation, especially when two of its four experts have expressly denied its possibility? And further weakening the slender thread, three of those experts admit the probability of other causes.

An indispensable condition to the establishment of appellant's theory would have been proof that the lubricating oil was in fact contaminated by salt water to an extent sufficient to cause gear failure. But the only oil sample chemically analyzed, even though taken from the pit of the engine (Aps. 1076, 1080) was, according to witnesses called by both sides [Summers (Aps. 1283-86), Blumberg (Aps. 1586-7) and Gilmour (Aps. 1499-1500)] of sufficient viscosity to lubricate properly the main engine of the "Urania." These three gentlemen were the only witnesses whose professional opinion was elicited as to the qualities

as a lubricant of the oil sample. Mr. Gilmour testified that the sample analyzed, taken as it was from the bottom of the engine, would be of poorer quality than the oil in circulation in the engine (Aps. 1500).

Appellant cites at length in its brief what it deems to be proof by its experts of the contamination of the oil, based upon visual and taste examination (Appellant's Br. 13-15), but its brief is strangely silent as to the only scientific test made, even though this test was taken at appellant's request and offered and introduced into evidence by it. It is also curious that an oil sample purportedly taken from the system prior to the vessel's arrival in Los Angeles was thrown overboard by the steward (Aps. 1417).

One need not be a lubrication expert to know that the lubricating qualities of oil cannot be determined by a subjective visual or taste test. Indeed, Mr. Summers, the senior surveyor called by appellant, although testifying that from a taste of the oil he believed it to have salt in it, gratuitously added that "such determination should be further confirmed by a laboratory test" (Aps. 1251). Subsequently, when Mr. Summers was presented with the oil analysis, he declared that an oil of the viscosity shown on the test would be adequate to lubricate the main engine of the "Urania" (Aps. 1283-86). Thus the last remaining thread offered to support appellant's theory of causation, to-wit, the speculative opinion of Mr. Summers, is severed by his later opinion based on scientific analysis.

The history of the "Urania's" engine operations

preceding the two breakdowns also contradicts any theory that salt water contamination of the oil through a leaking oil cooler could have caused the failure of the timing gears. The main engine functioned normally during continuous voyage at sea from the time of the vessel's departure from Puget Sound on October 15 until October 26, when the first breakdown occurred (Aps. 1369-73). On October 25, the day prior to the breakdown, the lubricating oil of the main engine was changed (Aps. 1372). In the absence of any erratic performance of the engine prior to October 25, it is simply not possible that progressive galling of the gears could have occurred and it is equally inconceivable that contamination of sufficient degree could have occurred after the oil change, in one day, through infinitesimal leaks in the oil cooler, sufficient to rupture case hardened steel helical timing gears. Herman Sanwick, by his qualifications the foremost authority on Diesel engines presented as a witness in the entire case, testified that any progressive contamination of the lubricating oil would increase the friction in the moving parts of the engine, which would in turn increase the temperature of the main bearings, and further, that in the absence of an increase in the main bearing temperatures, contaminated lubrication could not be the cause of timing gear failure (Aps. 1613-14). During the period from October 16 through October 25, the temperatures and pressures for the main engine were within normal operating range (Aps. 1376). See also the engine room log (Respondent's Exhibits A-12 and A-13).

Another persuasive fact which militates against

the theory of progressive contamination as a cause is the suddenness with which the second breakdown occurred. After the new timing gears had been installed and the lubricating oil changed again at Manzanillo, the "Urania" sailed at approximately 4:40 p.m. on November 3. About 27 hours later and at 7:00 p.m. on November 4, the engine was stopped for an inspection of the timing gears by Mr. Cross, the Union Diesel Engine Company service man aboard, and the same were found in good order. At 3:50 a.m. the following morning, approximately 9 hours later, the engine was stopped owing to erratic performance and the lower timing gears were found to be galled (Aps. 1343 and Respondent's Exhibit A-22).

Other probable causes.

While there is, after analysis, neither evidence nor inference left to support appellant's theory as to the cause of the engine breakdowns, there is much in the record to suggest the probability of other and more obvious causes. To begin, it is noteworthy that the service representative sent by the Union Diesel Engine Company, Mr. Cross, was ordered to Manzanillo with no responsibility to ascertain the cause of the gear failure, his orders specifically limiting him to the installation of a new set of timing gears (Aps. 966, 1062). His orders also directed him to return the vessel to Los Angeles (Aps. 1062, 977-78). He testified that the chief engineer had advised him upon his arrival that he had "done something" to one of the lubricating oil lines leading to the timing gears (Aps. 1030). Mr. Cross also found this oil line had

been carefully cleaned out prior to his arrival by the chief engineer, from which fact, together with his other conversations with the engineer, he gathered that this oil line had been plugged up (Aps. 1030). More concrete evidence of this condition is contained in the telegram from the master of the vessel in Manzanillo to Mr. Demetri Antippas on October 31, 1948. The full text of the telegram is as follows:

“Union Diesel serviceman arrived 7:30 P.M., October 30. Made inspection. Stop. Appears lubricating oil line had clogged up at some previous time and gears galled. Stop. Carried ashore vertical shaft in lathe and straightened slight bend. Stop. Making new model changes to governor to improve its function. Stop. Will proceed with repairs advising progress. BEIS.”

(The telegram is contained in Exhibits A-9 and A-10, which were admitted in evidence (Aps. 1397) but not printed in the Apostles (Aps. 139-140)).

In this connection, appellant ingenuously called attention in its brief to a serious indictment of the competency of the engine room personnel and officers by Mr. Cross (Appellant's Br. 28). Thus, in a wire from Manzanillo to his superiors, he states “All Air Water Lubricating Oil Tubing Should Be Replaced Stop Bearings Liners Pistons Etc Should Have Very Close Inspection Stop” (Aps. 1042). In his testimony, Mr. Cross said that a large portion of this tubing aboard the vessel was “badly kinked,” that the control station didn't work properly, that the fuel was not set to his satisfaction, that he recommended that the nozzles be taken out and finally

that the engine had been running hot and that he did not know what the cause was (Aps. 1042-44). These serious conditions either existed prior to the ship's departure from appellees' yard or were created at sea. The fact that the vessel successfully passed rigorous examination and inspection, together with both a sea trial and dock trials, is conclusive evidence that the conditions did not exist prior to sailing from appellees' yard. According to Mr. Cross, the condition of the tubing was externally visible (Aps. 1045). Had these conditions been present when the "Urania" left appellees' yard, it is unbelievable that she would have been approved for classification by Mr. Gallagher (See his detailed report of survey, Aps. 1650-1663) and approved and accepted by appellant's representative, Mr. Williams, whose very function it was to supervise the work (Aps. 595-596). Such an improbable assumption cannot be made, all evidence being to the contrary, but even if it were, the main engine work was entirely the responsibility of the appellant, as already noted herein. The inescapable facts are that these conditions were created after the "Urania's" departure from appellees' yard by misfeasance or nonfeasance of the ship's crew. This inevitable conclusion is directly supported by appellant's own admission contained in the deck log (Respondent's Exhibit A-8) entry for 1100 hours, October 29, 1948, the "Urania" then lying at Manzanillo, which reads "Ship's engineers refused to dismantle the necessary parts. We hired two machinists from shore and done the job" (Aps. 1331). Additional doubt is cast on the competency of the chief engineer

by the incident wherein he was removed from the throttle of the main engine during the trial run at the request of Mr. Gallagher of the American Bureau of Shipping (Aps. 384).

We turn now to a consideration of the conditions described by Mr. Cross and their probable relationship to the cause of the breakdowns. If the oil line leading to the timing gears was plugged as seems probable in view of the telegram sent by the master to appellant, this fact would have caused the gear failure. The kinking of lube oil lines (copper tubing) could have had the same effect (Cross, Aps. 1050; Blumberg, Aps. 1576). It is apparent that the abortive measure adopted by Mr. Cross of installing an additional lubricating oil line to the timing gears (Aps. 1050-51) was ill considered and adds nothing to appellant's theory of causation. If practically all the lubricating oil lines were badly kinked and such kinking could choke off the oil supply to the gears, and indeed to the additional oil line installed by Mr. Cross, nothing short of complete replacement or repair to such lines would eliminate the probability of the kinking of these lines as a cause (See Aps. 1592).

The testimony of Mr. Cross also discloses that the engine had been overheating prior to the first breakdown (Aps. 1029) and prior to the second breakdown, when he was aboard the vessel (Aps. 1046). He was unable to explain the cause of the overheating (Aps. 1044, 1061). Mr. Blumberg testified that the overheating of the engine in itself could cause

the galling of the gears (Aps. 1580) and the failure to ascertain the cause of the overheating prior to sailing from Manzanillo, was a serious departure from good Diesel engineering practice (Aps. 1585-6).

Another probable cause of timing gear failure which appellant has failed to discuss relates to excessive pressure or overloading of the timing gears resulting from improper adjustments of auxiliary equipment driven by the vertical shaft engaged by the timing gears. The fuel pump on the "Urania" was connected with the assembly of which the timing gears are a part (Respondent's Exhibit No. A-16). Significantly, the engine room log discloses that the main engine was shut down twice prior to the first breakdown for purposes of repacking and tightening of the packing in the fuel pumps (Aps. 1371-72). Mr. Blumberg testified that excessive tightening of the fuel pump which is driven by the helical timing gears would cause the fuel pump shaft to be restrained by friction thus transmitting an excessive load to the timing gears (Aps. 1577). Excessive loading of these gears or "binds" in the system were advanced by the experts as a common cause of such gear failure (Aps. 1576-77, 1275).

Appellant has made certain observations in its brief concerning the integrity and ability of appellees and their employees in an apparent attempt to bolster its theory. An examination of each of these points will reveal how ill-founded they are. First it is asserted that appellees failed to furnish a factory representative to supervise operation of the engine although re-

quired to do so by the specifications (Appellant's Br. 28). But appellant's representative, Mr. Williams, testified that he had ordered this item as a convenience to appellant, that the representative he wanted was at sea at the time and in consequence it was not fulfilled. Further he stated that the failure to delete this request from Libelants' Exhibit 4, was merely an oversight both on his part and that of appellees (Aps. 324, 325). Again at page 29 of its brief appellant recites the testimony of M. L. Newell wherein he expressed an opinion that because of the hardening of the paint on the bolts on the coolers it must have been at least a year since they had been removed, implying that the coolers had never been cleaned and tested during such period. In evaluating this testimony it is well to remember that this witness was by occupation an engineer on a fishing boat, did not hold an engineer's license, had only five years experience on fishing boats and is the brother of Mr. S. W. Newell, vice-president of the Union Diesel Engine Company who hired him to work on the "Urania" when it arrived at Los Angeles (Aps. 1087-88). Appellant nevertheless cites this testimony against that of (a) Mr. Williams who stated the coolers were cleaned and tested at appellees' yard (Abs. 362, 577-78), (b) Mr. Gallagher who saw the testing (Aps. 1693) and reported his examination of them and their good condition in his survey report (Libelants' Exhibit No. 17, Aps. 1658-59), (c) Mr. Oakland who did the cleaning and testing (Aps. 1437-39) and (d) the "Urania's" engine room log (Respondent's Exhibit No. 12, Aps. 1426) which recorded the cleaning

and testing of the coolers. In view of the record, Mr. Newell's entire testimony is subject to serious question. As to Mr. Weiler's testimony (Appellant's Br. 29), it adds nothing to that of Mr. Newell. Mr. Weiler cleaned and tested the cooler and repaired the leaks where found. He was not asked whether he could tell if the cooler had been recently cleaned and tested, but whether it had recently been repaired (Aps. 1126). The cooler was not repaired at appellees' yard, but merely cleaned and tested.

Appellant cites the trial judge's comment on what he considered to be lack of personal recollection of appellees' employees in three instances, as a reflection on the candor of such witnesses (Appellant's Br. 29), but appellant neglects to set out the trial judge's observations immediately following the quoted comment wherein he states:

"Yet, I am convinced, from a consideration of all the evidence and by a preponderance thereof, that one of the reasons why some of these foremen or subforemen may not have retained in their minds in minute detail what they personally did or saw done in connection with the repairs, was that they were doing so much of the work under direction of ship officers or personnel, notably the chief engineer or persons in the engine room department, and they were doing the work in detail as ordered rather than in accordance with written specifications or what the foremen or subforemen thought should be done. Consequently, in such instances, the final functioning of a repaired unit was not to be so much in accordance with the satisfaction of a foreman or subforeman, but was to be rather for the ap-

proval of Mr. Williams and Mr. Gallagher or as required by a department of the ship or its head particularly interested in the specific item.” (Aps. 70-71)

Because of the technical nature of much of the testimony, it is not feasible within the limits of this brief to explore the complex factors which bear directly upon the ultimate cause of the engine failure. Appellees do not contend that the evidence in support of the other probable causes of breakdowns is sufficient to establish the true causation, by a preponderance. However, we do contend that such evidence provides abundant proof that the true cause was never established and that it illustrates clearly how inadequate were the premises upon which certain opinions were ventured by the witnesses called in appellant's behalf. Many questions are posed in the record, scientifically reliable answers to which might have been given had the primary evidence been preserved for the trial. An examination of the record reveals that many vital facts concerning the history of the “Urania's” voyage and breakdowns, indispensable to the formulation of a trustworthy expert opinion as to causation, were unknown to appellant's witnesses when their speculative opinions were given by deposition prior to the trial. Much of the primary evidence, for reasons known only to appellant, was never preserved. Neither set of the galled timing gears was available at the trial. Despite the entry of an order by the District Court on March 9, 1948, directing appellant to produce “on or before the 14th day of March, 1949,” all parts removed from the “Urania”,

(Aps. 56-58) the lube oil cooler was not made available to appellees until late on the last day of the trial, April 18, 1949, after appellees had closed their case. Even then proof was entirely lacking that the cooler produced was from the "Urania". Finally, appellant failed to preserve any representative oil sample. The quality of the only sample scientifically analyzed was found to be of sufficient viscosity to lubricate the engine, and this sample was taken from the very dregs of the oil in the engine. Perhaps if the gears, cooler and oil had been available for analysis by metallurgists and lubrication experts, the true cause of the breakdown might have been scientifically established. Such failure to preserve and produce the primary evidence for appellees and the court, the evidence upon which its action was based, is entirely consistent with the conduct of appellant in attempting to sail the ship from appellees' yard without notification to appellees and without making provision for the payment of its repair bill, the balance of which was \$64,366.75 (See Aps. 212-15, 388, 390-91, 536-37). It is unnecessary to detail what a task appellees might have had in collecting their bill from a Panamanian corporation owned by Greek interests had the ship been successful in leaving for foreign waters (See Aps. 683-84), before arrest by the United States Marshal.

Perhaps nothing argues more persuasively that the real cause of engine failure was not established than the fact that after the repairs at Los Angeles, appellant felt it was necessary to stow an extra pair of timing gears aboard the vessel and send the engine

company's representative, Mr. Cross, with the ship to Manzanillo (Aps. 1223-24, 1019). Certainly if the cause had been established to appellant's and the engine manufacturer's satisfaction, there would have been no necessity to send Mr. Cross on his second long journey to Manzanillo. The only explanation for Mr. Cross' second trip, if the cause had been found in Los Angeles, would have been to teach the crew proper engine maintenance. The crew's previous profound disinterest in the welfare of the engine is imbedded in the log's statement that the crew *refused* to work on the engine (Aps. 1331). And their incompetence, even if they had been interested, is borne out by the fact that they could not even steer the vessel out of the Straits of Juan de Fuca, but had to put into Port Angeles for assistance in adjusting the telemotor (Aps. 656). It is small wonder that the master was relieved of his command, which was, incidentally, his first "experience with a Diesel powered vessel" (Aps. 691), on November 14, 1948, while the ship was at Los Angeles undergoing repair (See Aps. 641, 689). This fact seems to have been forgotten by Mr. Antippas, who testified that Captain Beis was removed by him from the "Urania" "to make his deposition" while she was in New Orleans (Aps. 545).

Clayton Heating Boiler

Appellant's claim relating to this item is grounded primarily on the hearsay testimony of the witness Biehler. What renders his testimony entirely irregular is that its important portions relate not even to hearsay facts, but to hearsay opinions—informal unsworn

statements by others to a witness who gratuitously admitted that "my memory isn't too good" (Aps. 821, 827, 829). Appellees had no opportunity to cross-examine the person or persons who actually effected the repairs either as to their qualifications to formulate opinions as to causation, or the facts upon which such opinions were based.

When the ship arrived in Los Angeles, the boiler pump was found to be damaged and Mr. Biehler, the manufacturer's representative, removed the pump from the ship to the manufacturer's shop for repair. Mr. Biehler testified that although he was not present at the time the pump was repaired, some unidentified person in the shop reported to him that in his (the unknown person's) opinion, the cause of the damage found was the failure to reassemble certain pump heads according to the manufacturer's markings (Aps. 827-28).

The only other evidence presented by appellant as to causation was the testimony of the vessel's chief engineer, who, when asked whether he or his crew repaired or cleaned the pump in any way, replied, "I myself dismantled it and found some broken parts or pieces" (Aps. 744).

From the foregoing statements, one part gossip and the other self serving, appellant contends the trial court's finding that appellant failed to sustain proof of causation should be reversed.

In support of the District Judge's finding, the record reveals that the pump was repaired and reassembled in appellees' yard under the supervision of Mr.

Woodman, the machinist foreman, whose qualifications as a machinist date back to 1917, and who had been employed as shop foreman at the same yard from 1937 to January, 1947, when his duties were changed to that of machinist foreman. He is the holder of a steam engineer's license, first assistant, ocean (Aps. 1475, 1460-61). Mr. Woodman stated that the practice followed in his shop in reassembling any machinery is to use the manufacturer's marks or to place identifying marks on machinery parts when disassembling the same where manufacturer's marks are absent, in order that the same may be replaced in their proper positions. He further testified that this practice was followed in the reassembling of the Clayton boiler pump on the "Urania" (Aps. 1474-76). Mr. Biehler stated that there are numbers on the pump heads of the Clayton boiler pump and that any competent mechanic could put it together properly (Aps. 855).

The survey report of Mr. Gallagher of the American Bureau discloses that in connection with his survey of the "Urania" prior to her departure the annual boiler survey was made in which all parts of the Clayton boiler were found after careful examination to be in good operating order (Libelants' Exhibit No. 17, Aps. 1661). He verified these facts in his deposition testimony (Aps. 1639). It will also be remembered that Mr. Williams approved and accepted all work on the vessel (Aps. 595-96).

Not only did the Clayton boiler have the benefit of the careful inspection of Messrs. Williams and Gallagher, but on October 15, 1948, the very day on which

the "Urania" sailed from appellees' yard, James D. Clarke, still another marine surveyor representing appellant, surveyed the boiler and, while finding a leaking condition caused by unsuitable packing or washers in the plungers of the pump, approved the pump after the condition was rectified. Specifically, Mr. Clarke testified that the defect was remedied by the installation of a different type of packing and that upon renewal of the packing, the leaking was cured and the pump restored to "good operating condition" (Aps. 756-59). Mr. Lillehei, one of appellees' superintendents, also witnessed the operation of the pump in the presence of Mr. Clarke (Aps. 1525). It is indeed surprising that appellant should seek to fasten liability for improper assembling of this unit on appellees when its own surveyor witnessed the assembled unit "to satisfy myself it was in good operating condition," hours before the sailing of the ship (Aps. 759). Moreover, Mr. Clarke's observation was not merely casual, since he viewed the equipment for "about 15 minutes." Apparently sensing the weakness of this phase of its case, appellant withheld injecting the issue into its pleadings until March 18, 1949, less than three weeks before trial (Aps. 59, 557-58). That the inclusion of the Clayton boiler in the cross-libel was an afterthought is borne out by the fact that Mr. Antippas personally discussed the repairs in November with Mr. Biehler (Aps. 859).

If improper assembling of the parts was the cause of the damage found, it is highly significant that the pump was partially dismantled when the manufacturer's service man came aboard the vessel (Aps.

837). That the manufacturer was suspicious of the treatment of this equipment by the ship's personnel is evidenced by its notation on its service order statement (Respondent's Exhibit A-15), quoted as follows:

“*Operation* maintainance (*sic*) and repair procedures as outlined in manual should be followed closely.” (Underscoring in original) (Aps. 1394)

This was an idle injunction to the chief engineer who, by his own admission, could read only “very little” English (Aps. 738). Evidently the trial and error of the perplexed engineer in assembling and disassembling the unit continued with bad effect for many more months, for the record shows that “further repairs” were necessary in March, 1949 (Aps. 557-58).

Telemotor

The provision in the original contract covering appellees' undertaking with respect to the telemotor reads:

“26. Steering Engine and Controls.

“Test out steering engine and steering gear and report condition found. Free up and libricate (*sic*) mechanical equipment found in good order. Remove locking device from rudder before testing.” (Libelants' Exhibit No. 1, Aps. 186-87)

In spite of the plain meaning of this provision contemplating only the testing out of the system and the lubrication of those parts found in good mechanical condition, appellant at pages 32 and 36, respectively, of its brief, states appellees were by contract bound to “overhaul” and “repair” the telemotor. It is understandable that appellant should seek to enlarge the

contractual undertaking considering the meager factual support the record affords its claim on this item. Those facts disclose not only a complete and competent discharge of appellees' undertaking, but a strong suggestion that this part of the vessel's equipment was mishandled and damaged because of either an imperfect understanding of proper maintenance or disregard of the rules of good marine practice. The failure of the telemotor within a few hours after the vessel's departure is an additional illustration, of which the record affords many more, that the crew of the "Urania" was incapable of handling the ship through inexperience or incompetence or both.

There is little need to detail the steps taken by appellees to perform this part of the contract. Skilled machinists and electricians employed by appellees, after lubricating the system and making the necessary examinations and tests, proved the telemotor in good working order (Aps. 1469-74, 1547-54). The telemotor system functioned perfectly on the sea trial of the "Urania," no difficulty of any kind having been experienced in its operations, according to Mr. Gallagher, who was passing on the vessel for classification by the American Bureau of Shipping (Aps. 1642, 1659). Apparently Mr. Gallagher could not express the same satisfaction with the chief engineer, whom he requested be withdrawn from the throttle (Aps. 384). Mr. Williams also stated that during the sea trial the vessel "steered and obeyed the rudder" properly (Aps. 360). The system was functioning properly when the vessel sailed and no trouble was encountered until the vessel was "about six miles outside of Port

Angeles" (Aps. 656). Mr. Short, the electrician who effected repairs to the telemotor at Port Angeles, stated that the system was oscillating because certain working parts had gotten out of proper mechanical adjustment (Aps. 1542). He expressed the opinion that the system had been "tampered with" because the cover enclosing that part of the steering engine where he effected the adjustment, had been removed prior to his arrival on board (Aps. 1537). Mr. Clarke, surveyor sent by appellant's agent to Port Angeles to correct the telemotor, testified the vessel's chief engineer had advised him that he attempted to remedy the trouble before Mr. Clarke arrived, thus lending support to the opinion expressed by Mr. Short (Aps. 775). Appellant's theory that a broken wire caused the breakdown is untenable in view of Mr. Gallagher's report that the whole electrical system had been measured by megger and all circuits restored to good order (Aps. 1660), and Mr. Short's testimony that he had established there was continuity in the wiring and that the electrical system was intact before any other tests were made (Aps. 1530). In sum, proof is entirely lacking that the telemotor breakdown was caused by negligence on the part of appellees.

Burden of Proof

Appellant cites *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.*, 281 Fed. 97 (C.C.A. 2d, 1922) under the heading in its brief, "Failure of Telemotor Steering System," apparently to sustain the proposition that the burden of proof rests upon appellees to show that the damages were not proximately caused by some negligent act or omission by them (Ap-

pellant's Br. 34-37). The rule of the cited case applies neither to the claim for telemotor failure nor to the issues raised by main engine breakdowns and Clayton boiler, as urged by appellant. The *Pan-American* case does not apply because first, the defendant in that case had exclusive custody of the bailed article. Here appellant never relinquished control of the ship, or any part thereof.

The general rule in the law of bailment concerning burden of proof is that in an action by the bailor against a bailee for loss of or damage to the bailed property, after the bailor has proved the bailment and failure of the bailee to deliver the property upon demand, or proved redelivery of the property in a defective condition, the burden of going forward with the evidence is upon the bailee to show that the loss or damage was not due to his negligence. The burden of proof, of course, never shifts, but the burden of going forward with the evidence is upon the bailee by reason of a legal presumption operating in favor of the bailor in such circumstances. Here appellant wholly failed to sustain its burden of proof that the bailed article was redelivered in a defective condition, in consequence of which appellees had no presumption to meet. But even if appellant had sustained such burden, the general rule announced would not apply since the appellees did not have exclusive possession of the property. The rule is that when the bailor retains control over the property or when the property is in the mutual custody of bailor and bailee, the burden of proof rests on the bailor as in any case of alleged negligence. 8 C.J.S. 347, Bailments, Sec. 50,

6 Am. Jur. 461, Bailments, Sec. 381, *The DuPont*, 14, F. Supp. 193 (D.C. Md. 1936), *Moe v. American Ice & Cold Storage Co.*, 30 Wn.(2d) 51, 190 P.(2d) 755 (1948). Indeed, this rule is recognized by the court in the *Pan-American* case, where the court says at page 107:

“It will be admitted that the rule which raises a presumption of negligence in the bailee, where goods are delivered in good condition, does not apply if the possession of the bailee has not been exclusive of the bailor.”

Another feature which distinguishes the *Pan-American* case from the instant case is that the collision in the cited case occurred immediately upon the ship's being returned to the owners. Here the breakdowns of the main engine occurred after the vessel had traveled 2400 miles. Surely there is no rule of law which requires the repair yard to establish affirmatively the cause of such breakdowns. The difficulties of such proof would be insurmountable, especially where, as here, the owners did not notify the yard of the breakdowns until the ship had sailed for foreign waters, and the owners either refused or neglected to make available to the yard, the damaged ship and its component parts.

The correct rule to be applied in the instant case respecting burden of proof is concisely stated in a recent opinion of the United States Court of Appeals for the Sixth Circuit. In that case, the vessel was libeled after an accident in which a tug capsized while furnishing services to the vessel, which was stranded on a bar. The issues raised by the libel was whether

the owners of the ship, acting through the master and crew, were guilty of negligent acts proximately causing the capsizing of the tug. In discussing this issue, Judge Hamilton said in his opinion:

“It is not enough for the libellant to prove that the negligence might perhaps have caused the injury. If the injury complained of might well have resulted from one of many causes, it is incumbent upon the libellant to produce evidence which will exclude the operation of those causes for which the Master or the crew is under no legal obligation. If the cause of the injury may be as reasonably attributed to an act for which the Master and crew are not liable as to one for which they are, the libellant has not sustained the burden of fastening tortious conduct upon the Master or crew. The evidence showing negligence must come from witnesses who speak as knowers, not as guessers.” *America-B. F. Jones* (6 C.C.A.) 1945 A.M.C. 987, 991.

Damages

Concerning this issue, the sole item which would appear to warrant discussion is Cross-Libel Item No. 15 (See Appellant's Br. 38) which is denominated “Loss of profits during corrective repairs * * * \$7000.00.” Appellant's proof wholly failed as to this item since there is no evidence that the vessel would have been profitably engaged during the period of the repairs. There is complete lack of evidence of what “the charter market was for a vessel of this type during the period of the breakdown” (See remarks of District Judge quoted in Appellant's Br. 52). To support its contention that its proffered exhibit of charter party of the vessel in December, 1948, was ad-

missible, appellant cites *The Penelopi*, 148 F.(2d) 884 (C.C.A.2d, 1945). We do not believe that the holding of this case goes so far as to allow admission of evidence as to profits made by the vessel on a later voyage in distant waters. It must be kept in mind that the voyage on which the breakdowns occurred was the maiden voyage of the "Urania" for the appellant, and the product which was carried on the December charter party was "Benzene (Benzol)" (See exhibit attached to back cover of appellant's brief). There is no showing in the record that the "Urania" was equipped to carry this product when she left appellees' yard. We submit, in any event, that evidence of the December charter party was properly excluded for the reasons advanced by appellees' proctors (Appellant's Br. 50-52).

CONCLUSION

To summarize appellees' position on the main engine breakdowns:

(1) Appellees had no duty respecting work on the main engine other than to obey the orders and instructions of appellant under the supervision and control of its authorized agents;

(2) Even had appelless undertaken responsibility for this work, the work as accomplished was in all respects performed in a competent and workmanlike manner;

(3) Appellant has wholly failed in its attempt to relate the breakdowns to work performed at appellees' yard.

Respecting the Clayton boiler and telemotor, we submit:

(1) Appellant has not sustained its burden of proof that the failures of these units was due to any act or omission by appellees;

(2) The preponderance of evidence adduced concerning these items affirmatively shows that such failures were caused by the negligence of appellant's own servants.

The trial of this action consumed nine court days and included the testimony of 35 witnesses. Despite the length of the case and the technical nature of the evidence, the District Judge was not beset by any doubts in reaching his decision. His comprehensive and analytical opinion delivered at the close of argument contains a thoughtful evaluation of all the evidence.

He found no merit in any of the contentions advanced by appellant. In large measure the appellant acquiesced in the court's findings by abandoning on appeal many of the contentions it urged most vigorously below. We are confident that this Court, after it has considered the record and the briefs, will be as firmly convinced as was the District Judge that appellant has not sustained its burden on any of the issues, and will affirm the decree in all particulars.

Respectfully submitted,

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RUSSELL V. HOKANSON,
RICHARD S. WHITE,

Proctors for Appellees.

